UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL GOLD, HOWARD GUY HALBETT, and JOHN FRANK FUSCO, Appellants,	)	
-vs-	)	No. 21176
UNITED STATES OF AMERICA, Appellee.	)	

APPELLANTS' OPENING BRIEF

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I N D E X

LIST OF AUTHORITIES CITED

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UNITED STATES OF AMERICA, Appellee.	)	APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the District of Nevada, adjudging the Appellant Gold guilty as charged in Counts I and II of the Indictment and the Appellants Halbett and Fusco guilty as charged in Count II of the Indictment.

The offense occurred in the District of Nevada. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 371, 1462 and 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF PLEADINGS AND FACTS

The Appellants and Antoinette Mary Fusco, on November 18, 1965, were charged by a two count Indictment in the United States District Court for the District of Nevada with violating

[R.5-7].[1]

The Appellants Gold and Halbett, prior to trial, filed a Motion for Return of Property and to Suppress Evidence [R.13-28], which Motion was joined in by the Appellant Fusco [R.T.40][2]. The Motion to Suppress was heard during the trial when the obscene motion picture films were offered into evidence and the Motion was denied [R.T.219].

The trial Court, when the Government had rested its case in chief, granted Appellants Halbett's and Fusco's Motions for Judgment of Acquittal as to Count I of the Indictment [R.T.312]. The Appellants, at the close of all evidence, again moved for a Judgment of Acquittal, which Motions were denied by the trial Court as to Appellants Gold and Fusco and the ruling reserved as to Appellant Halbett [R.T.344-349].

The jury, after a three (3) day trial held on March 9-11, 1966, found the Appellant Gold guilty as charged in Counts I and II of the Indictment and the Appellants Halbett and Fusco each guilty as charged in Count II of the Indictment [R.38-39, R.T.418-420]. Each of the Appellants filed Motions for Judgment of Acquittal or In The Alternative For a New Trial [R.33], which the Court denied [R.37].

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1. "R" refers to Record on Appeal.
2. "R.T." refers to Reporter's Transcript of Trial Proceedings.

On April 2, 1966, Appellant Gold was sentenced and committed to the custody of the Attorney General for five (5) years on Counts I and II, to run concurrently. Appellant Halbett's sentence was suspended and he was placed on probation for five (5) years. Appellant Fusco was sentenced to five (5) years, his term of imprisonment to be consecutive to the sentence he was then serving. The Appellants appealed their respective convictions.

STATEMENT OF THE CASE

Special Agents from the Federal Bureau of Investigation initiated and maintained a surveillance of the premises at 19-1/2 Pacific Street, Henderson, Nevada for four days, between 8:00 o'clock A.M. and 6:00 o'clock P.M., during the period October 27, 1965 through November 2, 1965 [R.T.48-53,58]. The name EASTERN FILM LABORATORIES appeared on the glass door of the address [R.T.51].

During the four day surveillance the Appellants Gold and Halbett were both observed, by Special Agents, entering and leaving the premises on various occasions [R.T.49-53]. The Agents' point of surveillance was directly across the street from the premises at 19-1/2 Pacific Street.

The Appellants Gold and Halbett, on November 3, 1965,

both arrived at the Pacific Street address, during the morning hours, in a blue Cadillac automobile. At approximately 2:40 o'clock P.M., the two Appellants were both observed loading five cartons into the Cadillac. This loading of the Cadillac took place at approximately 2:40 o'clock P.M. [R.T.59-61]. Special Agent Salisbury, after the Cadillac was loaded, observed Appellants Gold and Halbett leave the Pacific Street premises together in the Cadillac, with Appellant Gold driving [R.T.63-64].

Approximately an hour later, Agent Salisbury and other Special Agents, observed the Cadillac parked at the United Air Lines Freight Office at McCarran Field, Las Vegas, Nevada. The trunk of the Cadillac was open and five cartons, similar to the cartons that were loaded at the Pacific Street address, were on a set of weighing scales [R.T.62-63].

Special Agent Drake also observed the Appellants Gold and Halbett pack the cartons in the Cadillac and leave together with Gold driving the Cadillac [R.T.73]. At approximately 3:05 o'clock P.M. of the same day, Agent Drake again observed the Cadillac being driven by Gold, but without the Appellant Halbett [R.T.74]. Special Agent McFaul was at or near the United Air Lines Freight Office when the Appellant Gold arrived, alone, and with Appellant Halbett. The cartons were taken out of the Cadillac and placed on a scale by an United Air Lines employee [R.T.79-82].

air bill for the five cartons that were brought to United Air Lines [R.T.83-86]. Hooker did not identify or recognize the person from whom he obtained the cartons [R.T.87]. However, Special Agent Doyle observed the Appellant Gold park at the rear of United Air Lines shipping area, and further observed Art Hooker unload the cartons from the Cadillac and place the cartons on the scale [R.T.150-151].

Agents Doyle and Murray then contacted United Air Lines Customer Service Manager Dunne and advised him that the five cartons were believed to contain something other than the contents of the air bill of lading [R.T.190]. Dunne, in response to the situation then presented, instructed the freight supervisor to take the shipment into the air freight room. The description of the contents of the air bill read--"electrical controls". When the carton was opened, film cans were found inside [R.T.104]. Dunne opened one of the film cans, looked at the films and notified the F.B.I.

Agents Doyle and Murray took three reels of film to a United Air Lines Office and ran the film on a projector. The three reels of film depicted oral sodomy, sexual relations between opposite sexes, and oral copulation [R.T.153-154]. Dunne testified that it was his decision to initially open the carton [R.T.105]. The five cartons were never placed on a United Air

than the United Air Lines Freight Dock [R.T.122].

The following day, November 4, 1965, F.B.I. Agents executed a search warrant at the United Air Lines Office and seized the five cartons, including the carton that had previously been opened by Dunne [R.T.136-138]. The five cartons contained 200 reels of film in each carton [R.T.156]. Each reel of film was examined by the Agents [R.T.161]. The Appellants' trial counsel selected a reel of film from each carton, viewed the film, and stipulated that the films depicted obscene scenes [R.T.230-233].

In the afternoon of November 4, 1965, at the United Air Lines freight office, at Newark, New Jersey, a woman and a man identified as John Fusco, stopped at the freight counter to pick up a shipment for a Mrs. Rocco [R.T.236-238]. The couple had a piece of paper on which an air bill number was written [R.T.237]. The freight agent checked, and determined the requested shipment wasn't on hand [R.T.242]. The air bill, in evidence as Exhibit 13, contained the same bill number the couple presented [R.T.246].

Special Agent Jenkins was stationed at the Newark Airport and observed the Appellant Fusco and Antoinette Fusco at the United Air Lines freight counter when they called for the shipment [R.T.253]. The next day, F.B.I. Agents arrested

Jersey. The Agents searched her apartment incident to her arrest [R.T.256-257]. The arresting Agents, among other evidentiary items, found and seized Western Union Money Order Receipts, on which the name Samuel Gold appeared, which receipts were admitted into evidence as Exhibit 15 [R.T.263]. The Appellant Fusco was arrested on the same day in Jersey City, New Jersey [R.T.265].

The Appellants Gold and Halbett filed a Motion for Return of Property and to Suppress Evidence [R.11-17], which Motion was joined in by Appellant Fusco [R.3]. The Motion was argued and denied by the Court [R.T.183-219]. The Appellants, when the Government rested its case, moved for Judgment of Acquittal as to all counts [R.T.285-312]. The Motions for Appellants Halbett and Fusco were granted as to Count I [R.T.312]. The Appellants, when all the evidence was closed, again moved for Judgment of Acquittal for the remaining counts. The trial Court reserved ruling on Halbett's Motions and denied Gold and Fusco's Motions [R.T.344-349]. The Court, after the jury returned verdicts of guilty as to the remaining counts, denied Appellant Halbett's Motion [R.T. 424-425]. The Appellants, within five days after return of verdicts, filed Motions for Judgment of Acquittal or in the Alternative for a New Trial [R.31-35, 33-36], which Motions were denied [R.3].

1. The trial Court abused its discretion when, during the voir dire examination, it refused to inquire into the religious background of each juror.

2. The trial Court erred in taking Judicial notice that United Air Lines was a common carrier.

3. The trial Court erred in not granting Appellant's Motions for Judgment of Acquittal at the conclusion of the Government's case in chief, when all evidence had been closed, when it denied the Motion for Judgment of Acquittal or In The Alternative For a New Trial.

S U M M A R Y

The Appellant Gold was indicted, tried and convicted for violating Title 18, United States Code, Section 1462. All of the Appellants were indicted, tried and convicted for violating Title 18, United States Code, Section 371.

The Appellant Gold contends that, but for the errors committed by the trial Court in Judicially noticing United Air Lines was a common carrier and that as a matter of law Section 1462 had been violated, the evidence was insufficient to show Appellant Gold violated the Section and the Appellant Gold's Motion for Judgment of Acquittal should have been granted.

The Appellants jointly and severally contend that the evidence before the Court was insufficient to show that a conspiracy had been formed by the Appellants and that any act

A R G U M E N T

I.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN, DURING VOIR DIRE EXAMINATION, IT REFUSED TO INQUIRE INTO THE RELIGIOUS BACKGROUND OF EACH JUROR.

The Appellants were charged by Indictment with causing to be transported and conspiring to have transported by a common carrier, in interstate commerce, obscene, lewd, lascivious and filthy motion picture films [R.5-7].

The Indictment was read by the Clerk to the jury prior to voir dire examination [R.T.5-8]. The trial Court conducted its voir dire examination of the jurors [R.T.8-17] and upon completing voir dire, the Court inquired of Appellants' trial counsel whether they had any questions [R.T.17]. The Court was requested to make inquiry concerning the religious background of each juror. The Court agreed to inquire only concerning the jurors' religious denominations [R.T.17]. However, the Court later refused to make such inquiry, holding that the jurors' religious background had nothing to do with the jurors' qualifications to sit in this trial [R.T.34].

The Appellants contend the Court's refusal, to make inquiry as requested, was an abuse of discretion and prejudicial error.

ground, training and participation are crucial to the juror's composition and makeup when he sits as a juror in an obscenity case. The Court's refusal to make this crucial inquiry, closed the door on the Appellants and when Appellants exercised their peremptory challenges, they were required to exercise their challenges blindly without the benefit of this all important knowledge.

The rule in the Ninth Circuit, as in all of the Circuits, is that questions to be asked the jury on voir dire examination are wholly a matter of discretion for the trial Court. Alverez v. United States, 282 F.2d 435, 437-438, (9th Cir. 1960). The trial Court exercised its discretion and kept the Appellants from knowing the religious denomination of each juror. It is common knowledge that some religious groups take a more narrow view of obscenity than other religious groups. The Appellants were effectively precluded from excusing any jurors for reasons of religion or morality, when one of the issues before the Court was the obscene nature of the films.

By contrast, it was held in United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), that asking, whether a prospective juror taught Sunday School and would be prejudiced against anyone accepting wagers, was not an abuse of discretion. It can logically be argued that refusing to make an inquiry in this case was an abuse of the Court's discretion.

THE TRIAL COURT ERRED IN TAKING JUDICIAL NOTICE THAT UNITED AIR LINES WAS A COMMON CARRIER.

The Appellants were charged by Indictment with violating Title 18, United States Code, Sections 371 and 1462 [R.5-7]. The Appellant Gold alone stands convicted of violating Section 1462, as charged in Count I of the Indictment and all of the Appellants stand convicted of violating Section 371 as charged in Count II of the Indictment.

The language of Title 18, United States Code, Section 1462 makes it a crime for anyone to knowingly use a common carrier for carriage in interstate commerce of any obscene, lewd, lascivious and filthy motion picture film. The charging portion of Count I of the Indictment alleged that Appellant Gold "did knowingly use...a common carrier that is United Air Line, for the carriage in interstate commerce from Clark County, Nevada to Hoboken, New Jersey..." of the prohibited items. The elements for a Section 1462 violation are:

(1) Knowingly use a common carrier

(2) For carriage in interstate commerce of

(3) Obscene, lewd, filthy and lascivious motion picture film.

The Government requested the trial Court to take Judicial notice of the fact that United Air Lines is a common

objected to the request on the ground the Court could not Judicially notice an element of the crime and the objection was sustained [R.T.238-240].

When the Government rested its case in chief, the Appellants moved for a Judgment of Acquittal [R.T. 285-312]. The Appellants urged, as one of their grounds for acquittal, that the Court could not take Judicial notice that United Air Lines was a common carrier [R.T.297,312]. The trial court, at least impliedly, reversed its ruling to Appellants' objection that it could not Judicially notice United Air Lines was a common carrier and took Judicial notice [R.T.312].

Each of the Appellants entered pleas of not guilty to Counts I and II of the Indictment [R.2-3] and placed the burden of proving the elements of the crimes charged upon the Government. "Where a defendant pleads not guilty, he places upon the government the burden of proving all essential facts alleged. . ." United States v. Hoyland, 264 F.2d 346 (7th Cir. 1959). The Appellants' pleas of not guilty placed the burden of proof on the Government, and this included proof that United Air Lines was a common carrier. "The government must prove every essential element of the offense." Newsom v. United States, 335 F.2d 237, 238 (5th Cir. 1964).

The only proof offered by the Government that United Air Lines was a common carrier, was the testimony of United Air Lines Employees, Customer Service Manager Dunne [R.T.101-123], and Schuerman [R.T.236-255], neither of whom were in executive positions and could prove other than vocally that United Air Lines was a common carrier. The Government did offer into evidence a United Air Lines CAB Tariff [R.T.107] not for the purpose of establishing the fact that United Air Lines was a common carrier, but apparently as Witness Dunne's authority for inspecting and opening one of the cartons the Appellant Gold had shipped [R.T.117].

Judicial notice has been defined as "...a substitute for the conventional method of taking evidence to establish facts." Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303 (7th Cir. 1956). Unquestionably, interstate transportation by a common carrier were elements of the crime charged that had to be proved, and for which Judicial notice could not be substituted.

When Judicial notice has been taken of the fact that transportation charged was interstate commerce, notice has usually followed a guilty plea and admission of all the facts pleaded. Cf Walker v. United States, 154 F.Supp. 648, 650 (U.S.D.C.D. N.J. 1957).

"Whether an air carrier is a common carrier is determined by the same principles as are applied in the

cases of carriers by other means...A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately...." Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 490 (8th Cir. 1959). Although the Government offered the testimony of Mr. Schuerman [R.T.240-242,249], his testimony fell short of establishing United Air Lines as a common carrier as defined in the Arrow Aviation Case, supra.

The proof required in this case to establish United Air Lines as a common carrier, is not unlike the proof required in proving a bank is a Member Bank or is insured by the Federal Deposit Insurance Corporation, for a violation of Title 18, United States Code, Section 2113(a-d). In the bank cases, an authenticated certificate from the Comtroller General of the United States will suffice, or testimony by an appropriate bank officer, together with the bank's certificate is sufficient.

The Government offered no documentary or testimonial evidence that United Air Lines was a common carrier. Title 49, United States Code, Section 1371, contemplates that air carriers shall have a Certificate of Public Convenience issued by the Civil Aeronautics Board. Possibly a certified copy of such Certificate would haveestablished the common carrier status of United Air Lines, but its status could not be established by Judicial notice. "The Court itself

cannot take judicial knowledge of facts to establish or disprove the very issue on which the case is tried...." Exparte Chin Yoke Tung, 2 F.Supp. 549 (U.S.D.C. W.D. Wash. N.D. 1932).

The Eighth Circuit Court of Appeals in Alexander v. United States, 271 F.2d 140 (1959), held that Judicial notice could not be taken of the character of a neighborhood, if the character of the neighborhood was relevant upon the issues in the case. The Judicial notice taken in this case was relevant, had a direct bearing on the issues in the case, and was prejudiced.

III.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT GOLD'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNT I OF THE INDICTMENT.

The Appellant Gold, on three separate occasions, moved the Court to enter a Judgment of Acquittal as to Count I. When the Government rested its case in chief [R.T.285-290]; when all evidence was closed [R.T.345-349]; and after the jury returned its verdict [R.31-35]. All Motions were denied.

The prohibited obscene motion picture film, packaged in five cartons, was transported to McCarran Field by Appellant Gold [R.T.149-150]. The Appellant drove his

Cadillac to the United Air Lines freight loading area, where Freight Agent Hooker unloaded the car and placed the five cartons on a scale [R.T.98-101] and prepared a straight air bill for the five cartons [R.T.84-85,92]. The Appellant Gold paid $45.27 cash for the freight charges [R.T.87-88]. The cartons were next moved from the scale into United Air Lines Air Freight Room [R.T.104]. Mr. Dunne, United Air Lines employee, decided the cartons, after opening one carton and noting the contents, should not be shipped [R.T.109]. The cartons stayed in Dunne's office until the following morning [R.T.110]. The five cartons moved no further along than the freight dock area of United Air Lines [R.T.122] and did not start on a journey in interstate commerce.

The Statute, Title 18, United States Code, Section 1462, contemplates and requires carriage in interstate commerce before the Statute is violated. Section 1462 was amended in 1958. See 1958 U.S. Code Cong. and Admin. News, p. 4012. Prior to the Amendment, the offense denounced by this section was complete when the proscribed articles were knowingly deposited for carriage in interstate commerce.

The 1958 Amendment substitutes the word "uses" for the word "deposits". Conceivably, prior to the 1958 Amendment, a violation could occur when the proscribed articles were merely deposited with a common carrier for carriage in inter-

interstate commerce is "used".

The Statutory or legislature history of Section 1462 and its predecessor, Section 396, is scant and does not answer or solve the dilemma presented by this appeal--did the Section require, for its violation, more than merely delivering the film to the United Air Lines freight counter.

The 1958 Amendment was brought about by the Tenth Circuit's decision in United States v. Ross, 205 F.2d 619 (10th 1953). The purpose of the Amendment was to make the offense continuous and prosecutable in two districts.

The Supreme Court of the United States in United States v. Alpers, 338 U.S. 680, 70 S.Ct. 352, 94 L.Ed. 457 (1950) considered the legislative purpose of Section 396, predecessor to Section 1462 and stated "The obvious purpose of the legislation under consideration was to prevent the channels of interstate commerce from being used to disseminate any matter that. . .communicates obscene, lewd, lascivious or filthy ideas." 338 U.S. at page 683, 70 S.Ct. at page 354. From this statement it is clear that interstate commerce must be used before the Section is violated. Section 1462, as amended, makes it a crime to use interstate commerce either for carriage or receipt of the obscene matter. The individual could not be charged with receiving the obscene matter from the common carrier, unless the common carrier

had transported the matter in interstate commerce, so it would logically follow that a person could not be charged, as Appellant Gold has been charged, unless the common carrier was used to carry the obscene matter in interstate commerce (emphasis added).

Appellant's position is even more plausible, if for some physical impossibility (nationwide air strike) the obscene matter was never transported in interstate commerce and remained at the freight depot. Certainly, the avenues of commerce could not thereby be saturated with the obscene matter the Statute was inacted to curb.

A review of the reported decision does not answer the question--what movement in interstate commerce is necessary to constitute a violation of Section 1462? The violation has occurred when the obscene matter has actually been deposited and transported in interstate commerce. Rodd v. United States, 165 F.2d 54 (9th Cir. 1947); and when the obscene matter has actually been taken from a common carrier after carriage in interstate commerce. United States v. Hochman, 277 F.2d 631 (7th Cir. 1960), Alexander v. United States, 271 F.2d 140 (8th Cir. 1959). But never has a violation been sustained by mere delivery to a common carrier's freight office.

Congress has seen fit by legislation to proscribe and make criminal, certain activities, but only if the activity takes place in interstate commerce. Transporting a stolen motor vehicle, a violation of 18 U.S.C. §2312; transporting forged or stolen securities, a violation of 18 U.S.C. §2314; transporting women for the purposes of prostitution, a violation of 18 U.S.C. §2421. To constitute a violation of any of these statutes, there must be interstate transportation. The unit of prosecution rule is aimed at the interstate commerce. The same reasoning applies to Appellant Gold's charged violation of Section 1462. There can be no violation unless there has been interstate carriage of the obscene matter.

The Appellant Gold was found guilty as to both Counts of the Indictment. His sentence on Count I and Count II was to run concurrently [R.39]. Although, the sentence is concurrent, the failure of the Government to prove interstate transportation of the obscene matter is of such prejudicial nature that the entire trial was infected and the Appellant was denied a fair trial as announced by this Circuit in Page v. United States, 356 F.2d 337, 338 (9th Cir. 1966).

IV.

THE COURT ERRED IN DENYING APPELLANTS' MOTIONS TO SUPPRESS THE OBSCENE FILM.

The Appellants, collectively and individually through their counsel, objected to the admission of the obscene film into evidence on the ground the five cartons of film were seized as a result of an unlawful search and seizure [R.T.183-219, 233, 285; R.31-35, R.33-36(Fusco)].

United Air Lines Customer Service Manager Dunne, testified that but for Special Agent Doyle contacting him concerning the five cartons, the cartons would not have been disturbed. Federal Agents, without a search warrant, could not lawfully open the five cartons.

The cartons were shipped by a straight air bill for delivery to the consignee [R.T.92]. But for Agents Doyle and Murray's intervention the one carton would not have been opened. "If it was not permissible for them [F.B.I.] to search or seize themselves, it was not permissible for them to have another person search for them and deliver up for their seizure." [Disserting opinion] Circuit Judge Merrill in Marshall v. United States, 352 F.2d 1016 (9th Cir. 1965). It would have been reasonable for the Agents to obtain a search warrant. The search of the carton by Dunne occurred at approximately 3:50 o'clock P.M. [R.T.102].

The next normally scheduled flight would have left at 1:00 o'clock A.M. the next morning [R.T.109].

The act of F.B.I. Agent Doyle in contacting Dunne was similar to the act of an officer going to an air lines freight office and inspecting a defendant's luggage, which search this Circuit held was unlawful without a search warrant, but held the Government had sustained the burden of proving it was not practical to obtain a search warrant. Hernandez v. United States, 353 F.2d 624, 626 (9th Cir. 1965). Here, it was practical for the Agents to secure a search warrant. The cartons had been instructed to the care of United Air Lines and the search of the cartons by Dunne was as unlawful as a search by the Agents and the obscene matter discovered thereby should have been suppressed. The search of the carton was not incident to Gold's arrest, nor was the requirement of a search warrant obviated by the emergency presented.

V.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' HALBETT'S AND FUSCO'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNT II OF THE INDICTMENT.

The Appellants together stand convicted of Count II of the Indictment, the Conspiracy Count [R.39(Fusco), R.38-39]. The Appellants, respectively, moved the trial Court for

Judgments of Acquittal as to Count II [R.T.292-297,345-349, R.33-36(Fusco), R.31-35], which Motions were denied, even though the trial Court felt the proof of conspiracy was tenuous as to Halbett [R.T.349].

The facts show the Appellants Halbett and Gold entered the premises together at 19-1/2 Pacific, Henderson, Nevada, on October 27, 28, 29, 1965 [R.T.48-54] and on November 2 and 3, 1965 [R.T.58-60]. The two men, during this period of days, entered the premises together, left occasionally during the day, and left together at night. They were in the premises usually between 9:00 o'clock A.M. and 5:00 o'clock P.M.

On November 3, 1965, the Appellants Halbett and Gold arrived together in a blue Cadillac [R.T.60]. Shortly after the noon hour, the two men loaded five cartons into the Cadillac and left the area together in the Cadillac, with Gold driving [R.T.61-64]. Less than an hour later the Cadillac, driven by the Appellant Gold, was driven to and parked at the United Air Lines Freight Office where the five cartons were unloaded [R.T.78-80].

The Appellant Halbett's entire participation in the conspiracy amounted to nothing more than loading five sealed cartons into the blue Cadillac and driving away. There was no proof, direct or circumstantial, that

Halbett had any knowledge of the obscene nature of the film. In fact, the following day, November 4, 1965, the Eastern Film Laboratory at 19-1/2 Pacific, was searched by F.B.I. Agents, and some 1500 reels of film were seized, of which by stipulation only 17 reels could be defined as obscene [R.T.328-331].

The facts before the Court and jury, touching on Appellant Halbett's participation in the conspiracy, is consistent with innocence.

There must be an intent to participate in a conspiracy, but to have the intent, knowledge must be established, clearly and unequivocally. Dennis v. United States, 302 F.2d 5 (10th Cir. 1962). The same degree of criminal intent necessary under a substantive offense must be proved to sustain a conspiracy to commit the offense. Danielson v. United States, 321 F.2d 441 (9th Cir. 1963). There must be proof that Halbett did some act or made some agreement, which manifests an intent to participate in the conspiracy. Bridges v. United States, 199 F.2d 811 (9th Cir. 1952).

Application of these several legal principles to Halbett's conspiracy clearly show that proof was insufficient and had the Court, as requested, applied "isolated transaction rule" announced in United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963), judgment of acquittal would

have been entered for Appellant Halbett.

There was no evidence to connect the Appellant Fusco to the alleged conspiracy. Appellant Fusco appeared at the United Air Lines freight counter in Newark, New Jersey, with a woman, identified as Antoinette Fusco. The two wanted to pick up a shipment for a Mrs. Rocco [R.T.236-238]. The woman did most of the talking. The two had a shipping number on a piece of paper [R.T.243-246]. The shipment had not arrived--so the Appellant and the woman left the airport area [R.T.256].

There was no other evidence to connect the Appellant Fusco with the alleged conspiracy. The record shows the woman was the moving party and from whose apartment Exhibits 15 through 18 were taken. Nothing appears in Exhibits 15 through 18 to show the Appellant Fusco was a member of the alleged conspiracy.

There being no proof to show Appellants Halbett and Gold were conspirators, the trial Court erred in denying Appellants Halbett's and Fusco's Motions for Judgment of Acquittal.

C O N C L U S I O N

The trial Court erred, and the Judgment, accordingly,

should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND E. SUTTON

RAYMOND E. SUTTON

CERTIFICATE OF SERVICE

I, RAYMOND E. SUTTON, certify that, as counsel for the Appellants in the within appeal, on the ____ day of September, 1966, I personally served the Attorney for the Appellee, by mailing three copies of Appellants' Opening Brief to JOSEPH L. WARD, United States Attorney for the District of Nevada, at Federal Building, Las Vegas, Nevada.

I certify under the penalty of perjury that the above and foregoing is true and correct.

RAYMOND E. SUTTON